

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 13, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: August 10, 2004

Case No.: TIA-0159

XXXXXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits for her late husband (the Worker). The Worker was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Worker filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the Appeal should be dismissed as moot.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Worker was employed as a welder and a general maintenance mechanic at the Paducah Gaseous Diffusion Plant (the plant). He worked at the plant for approximately 35 years, from 1952 to 1987.

The Applicant filed an application with OWA, requesting physician panel review of the following illnesses: lung cancer, respiratory failure, renal disease and renal failure. The Applicant claimed that these illnesses were due to exposures to toxic and hazardous materials at the plant.

The Physician Panel rendered a negative determination for each claimed illness. The Panel agreed that the Applicant had lung cancer but did not find that it was related to the Worker's employment with DOE. The Panel stated that the lung cancer was probably the result of smoking. The Panel indicated that there was no evidence of renal disease prior to the Worker's terminal illness from lung cancer. The Panel

found that the Worker's progressive decline in health was a direct result of the lung cancer. The Panel concluded that the renal failure was a terminal event secondary to the primary cancer and the resulting respiratory failure. See Physician's Panel Report. The OWA accepted the Physician Panel's determination. Subsequently, the Applicant filed the instant appeal.

In her appeal, The Applicant does not challenge the Panel's determination that the Worker had no evidence of renal disease prior to his terminal illness from lung cancer and that the renal and respiratory failure were associated with the terminal illness. Instead, the Applicant challenges the negative determination on the lung cancer. The Applicant's major objection is that there are notations in the OWA record that showed the Worker inhaled uranium and was burned by toxic chemicals during employment at the plant. See Applicant's Appeal Letter. Also included in the OWA record is a positive DOL Subpart B determination.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12.

A positive DOL Subpart B determination was received. A positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to a toxic exposure during employment at DOE. Authorization Act § 3675(a). See also *Worker Appeal*, Case No. TIA-0228, 29 DOE ¶ 80,202 (2005). Accordingly, Subpart E has rendered moot the physician panel determination and consideration of any challenge to the Panel report is not necessary.

As the foregoing indicates, the appeal should be dismissed as moot. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0159 be, and hereby is, dismissed.
- (2) This dismissal pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: